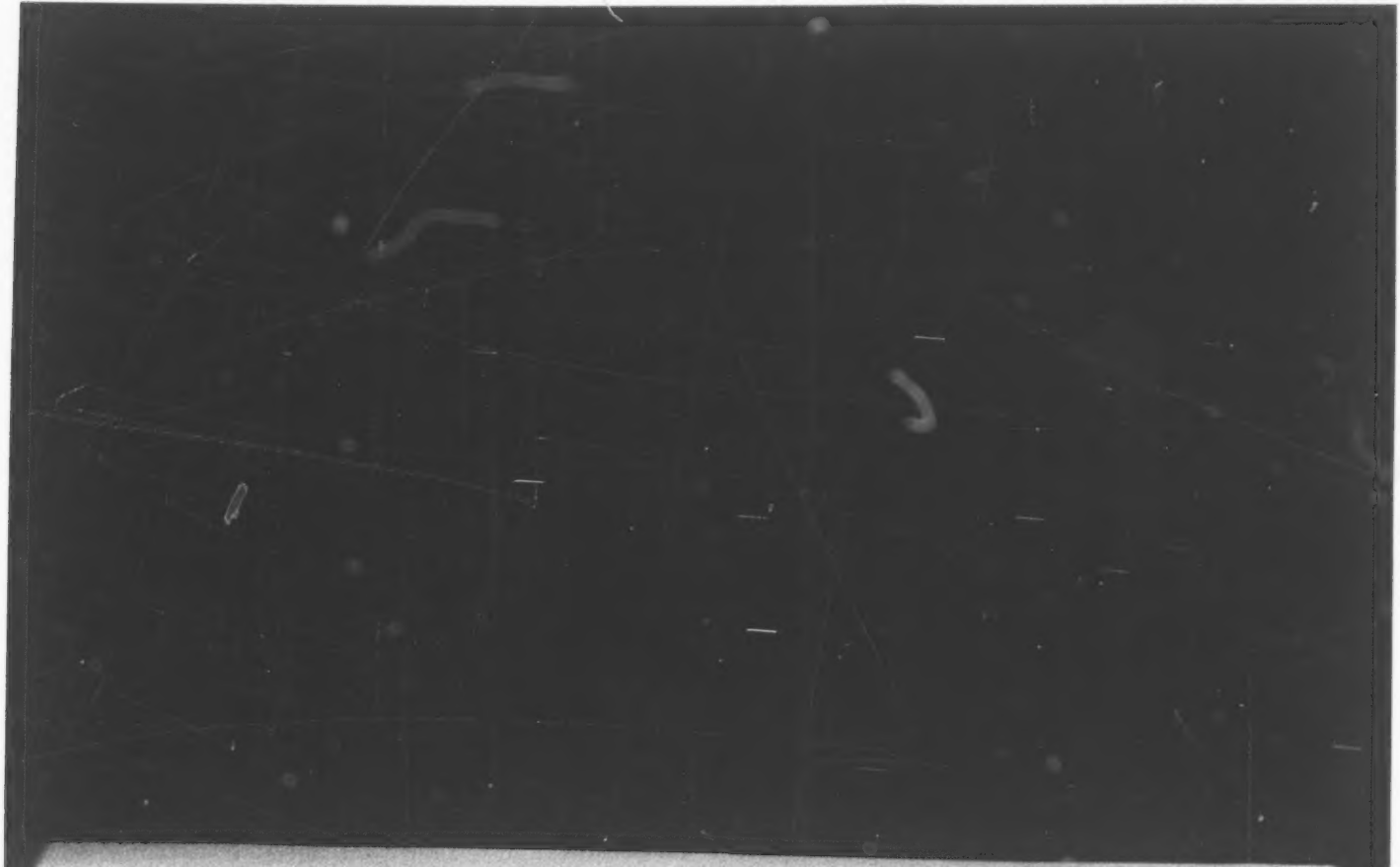




In the Supreme Court of the United States.

OCTOBER TERM, 1904.

FREDERICK W. LINCOLN, HENRY W. PEABODY, JOHN R. BRADLEE, and CHARLES D. BARRY, trading as copartners under the firm name and style of Henry W. Peabody & Co., plaintiffs in error,
v.
THE UNITED STATES. } No. 149.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WARNER, BARNES & CO. (LIMITED), appellant,
v.
THE UNITED STATES. } No. 466.

APPEAL FROM THE COURT OF CLAIMS.

ADDITIONAL BRIEF FOR APPELLEE.

I avail of the inquiry of the court at the close as permission to notice some of the points made in the opposing argument at bar.

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The claimants can not set up vested rights on the ground that their demands were filed before the act of March 8, 1902, was passed because—

The very question here is whether they have any valid rights at all.

Because, therefore, the principle determined in the De Lima case as to rights held valid which were asserted eleven days before an act speaking wholly as to the future does not apply; an act of Congress in this case (act of July 1, 1902) expressly related back for the purpose of validation.

And because while such a valid right vests when put in suit so as to escape a later enactment, here there was a valid exaction by the commander, like the "cotton bonus" in *Hamilton* v. *Dillin*, the payment was voluntary, as shown in that case, and the notion of vesting does not apply.

The decision in *Hamilton* v. *Dillin* sustains all three grounds of validity, viz, that being at war, the executive possessed authority; Congress possessed power to authorize in advance; and Congress possessed power to ratify afterwards.

These three tests embraced a place which this Government held. The principle, as applied in that and other cases which we cite, includes any such place even if finally surrounded by a wide zone of effective

control, even if it is the headquarters of an extending civil administration as well as the military forces, as at Manila.

Fortunes shift with the varying chances of war—they shifted rapidly and often in the Philippines for a time. Observe how they shifted in the Red River campaign of Porter and Banks during the civil war (*Mrs. Alexander's Cotton*).

In *Hamilton* v. *Dillin* the argument might have been made with much force—with far more reason than in later cases, and finally in the second Dooley case—that the exaction was an export tax. Would this court have listened to the argument? The court would not only have determined that the goods were destined for domestic rather than foreign territory, although shipped from hostile, insurrectionary districts, but the court would have made short work, I venture to say, of that form of challenging the war power on a constitutional pretext.

The Filipino insurgents proclaimed their independence and proclaimed war formally. They occupied Manila with us and then attacked us there; there were lines of bayonets wherever they were, near Manila at first and at all times throughout the region of which it is the center. The bayonets were not so numerous as

during our civil war, nor the territory embraced so extensive or so populous. But when serious at all it is not a question of degree. This was not a mere riot, nor even a "Whisky Insurrection." Manila was our military as well as civil headquarters; beneath its ultimate "firm control" and apparent peace, sedition, plotting, and the active propagandism of revolt were going on. Manila was also a revolutionary headquarters, all the more difficult to meet because the hostile sentiments and activities were secret—the aid covert. The situation is typified by the fact that Aguinaldo's proclamations were posted beside our own commanders'.

Must we be challenged by street barricades in order to constitute such a place, in such domestic territory, hostile and enemy country?

Surely the Diamond Rings case does not not justify that view, and the doctrines of the civil war cases, where, often, the actual bayonets and forces were at a distance, completely apply. The opposite view ends with the conception that we could not call a particular place in belligerent domestic territory *hostile* unless it were actually occupied by the enemy. If we did not hold it at all of course we could not levy duties there. The real question is: What do the imperative claims of war, under the particular circumstances, require? What does the commander, who is dealing with the actual, critical situation, determine the necessities to be? His power should not be curtailed because he avails of ordi-

nary tariff duties; because his strength gives him port control and one aspect of the case permits him to let in commerce. Could not a commander have placed an embargo on all commerce at New Orleans, and supplied the city from the surrounding country through the military lines under close scrutiny, and also charged barrier dues there? He might have done so, if for no other reason, to bring everybody into certain avenues of communication. Could he not, for the same reason, have done a less rigorous thing; imposed a tariff upon *all* merchandise arriving by sea from the loyal States as well as from abroad? The situation in the city might have justified and required that, to help espionage; there might have been open or secret aid to the Confederates, trading and banking for their benefit among native and foreign sympathizers. The President and Congress were in close touch with all the affairs and that was not deemed necessary. But could it not have been done? Might Congress not have authorized it or ratified? Must a good reason be given by a commander; must he tell his purposes and show his logic before acting? In the Prize Cases Justice Grier reservedly conjectures as to the reason for the "cotton bonus," but says the motive is not material. It was a matter of legitimate military power, and so it was at Manila.

Why was the treaty "not without significance" in the Dooley case? Because, giving legal title and possession, it marched with the facts of a quiet military

situation and nonresistance, so as to strike down unnecessary military duties in domestic territory, although not inconsistent with the necessary maintenance by the military of ordinary civil administration in other respects. And why, although not without significance, was the treaty not conclusive? Because a sharp challenge of possession might go on and there might be imperative necessities, as here; and the door was thus left open, not only for possible future cases, but for *this* case—for the Philippine aspect under this very treaty.

Manila and Iloilo were the only ports really important and open. The others were negligible and were, indeed, some for most of the time and all at some time, substantially under the control, open or secret, of the hostile forces. In fact, Manila was the only significant port. It was the *entrepôt* of the entire archipelago, the point where all our operations and all the resistances to them converged through different channels and instrumentalities. Controlling that port throughout the wide range of means essential, we controlled the islands. It was none the less the center of a hostile country because our armed hand grasped most firmly there. What was the reason why our commander at his headquarters at Manila endeavored and partly succeeded in shutting up the hemp ports? To keep hemp from coming out and therefore to keep rice from going in, thus crippling the enemy. A tariff against our own products at Manila (laying revenue aside) was simply a less harsh means of serving the same end indirectly.

It must be remembered that the Philippine tariff did not apply the Dingley schedules to foreign countries. Our military authorities, continuing Spanish rates for that oriental locality, after discontinuing the preferences to Spain, taxed with a view to local needs. They admitted free what we tax, or they taxed lightly what we tax heavily. We tax cleaned rice 2 cents per pound; they taxed and still tax (under the adoption of that tariff by Congress) *husked* rice, apparently the article in the same state, 50 cents per 100 kilos; that is, less than one-fourth of a cent a pound. Our authorities, controlling the tariff side, handled it as they found necessary for their military dilemma, but handled it also for the benefit of those peaceful inhabitants whose civil affairs they were administering. Now, if, under those circumstances, that territory was instantly privileged by our tariff and its own domestic status, it was also instantly bound, as in the different aspect presented in California (Cross *v.* Harrison); and the Dingley schedules must have been erected *totidem verbis* against all the rest of the world.

In reply to Mr. Ward's remarks at the close, there can be no doubt that since Congress, in March, 1902, adopted and confirmed the Philippine tariff, expressly including imports from the United States, it intended, in July, 1902, to ratify the tariff as laid, in its entirety, during the whole period in question.

The Court of Claims did not say and did not intend to say that the treaty was ineffective with respect to legal title and possession—that is, as giving the domestic character. It was a treaty of peace as well as cession, and the court simply meant that peace did not ensue, that ratification did not instantly accomplish *that* result, since war was raging and continued for three years.

We submit wholly, of course, to the authority of *De Lima* v. *Bidwell*, *Dooley* v. *United States*, and *Pepke* v. *United States*. But we say that this is a different controversy and that *Downes* v. *Bidwell* must not be forgotten. Mr. Coudert declares his inability to perceive or understand any other view than his own of the problem before the court. I do not go so far. I grasp his argument and know why, as such, it appeals so conclusively to the habit and predilections of his mind as counsel against the Government throughout the entire insular controversy. But I yield no whit in depth and earnestness of conviction. I am wholly persuaded that his confident argument rests upon a fallacy; that it begs the question.

1. We start with the war power and an imperative necessity for its exercise. When that is so it can not be trammeled; itself must determine reasons, degree of necessity, what particular orders and compulsions will meet the requirements. The courts will not usurp that function.

2. The De Lima case simply determined that Porto Rico was domestic territory respecting our tariff. The war power was not involved.

3. The first Dooley case decided that previous to ratification of the treaty Porto Rico was foreign territory and the military tariff valid—the war power, in exercise to meet hostilities, was not involved—and that subsequent to ratification that tariff was not valid, because we had title and possession, and there was no military necessity. The war power was not involved. But the door was left wide open by that opinion in case it were.

4. The Diamond Rings case related to this same territory, domestic, notwithstanding the insurrection, in title and in possession, sufficiently for *that* sequel to title as a *legal* element. Our own tariff was involved; the war power was not involved.

5. In the present cases the military tariff in the Philippines is presented. Military necessities existed; the executive determined that they demanded this provision and action. The war power was involved.

6. The first Dooley case, as to the period after ratification of the treaty, is a true correlative of the De Lima case. But the present cases are not the correlative of the Diamond Rings case, and there is the slip in the appellant's easy and assured logic.

7. *Downes* v. *Bidwell* shows what Congress might have done on April 11, 1899. It is always well for the Executive and legislature to concur in such grave crises, although it may not be constitutionally neces-

sary. If it were necessary here Congress did, by its enactments of March, 1901, and March and July, 1902, accomplish *as of the earlier date* what it might have accomplished *on* the earlier date. It acted *nunc pro tunc*, and ratified with the effect of a previous authority or previous act of its own.

In the final survey, how does the matter appear, untechnically, in plain sense and reason? Did not the Executive and Congress do what was *right?* Have the appellants any *just* claim? I leave with the court with becoming gravity, I trust, but with confidence, this solemn inquiry; they are to determine whether, when the nation is struggling with war, is surrounded by difficulties and perils, the courts will assume to say that the combined action of the Executive and legislature went beyond the necessities, although there was no tyrannical aggression, no violation of sacred guaranties. This situation—the competence and independence of the war power—once involved the very existence of the nation and may do so again.

HENRY M. HOYT,
Solicitor-General.

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